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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 698

WADE H. COOPER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The District Court did not render an opinion. The opinion of the Court of Appeals (Pet. 12–13) is reported at 238 F. 2d 40.

JURISDICTION

The judgment of the Court of Appeals was entered on October 25, 1956. (R. 55)[1] Petitioner's motions for a rehearing *en banc*, and for Judges Bazelon, Fahy, and Bastian (comprising the panel which heard the case) to disqualify themselves, were denied on November 26, 1956. A petition for a "mandatory

[1] Record references are to petitioner's printed record filed in this Court.

injunction or restraining order" filed in this Court on November 20, 1956, was denied on January 14, 1957. The petition for a writ of certiorari was filed on January 18, 1957. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254.

QUESTION PRESENTED

Whether the court below erred in holding that petitioner was barred in this suit from claiming any refund for 1946 by reason of *res judicata,* and from claiming any refund for 1947 through 1950 by reason of collateral estoppel.

STATUTE INVOLVED

Internal Revenue Code of 1939:

> SEC. 23. DEDUCTIONS FROM GROSS INCOME.
>
> * * * * *
>
> (g) *Capital Losses.*—
>
> (1) *Limitation.*—Losses from sales or exchanges of capital assets shall be allowed only to the extent provided in section 117.
>
> (2) *Securities Becoming Worthless.*—If any securities (as defined in paragraph (3) of this subsection) become worthless during the taxable year and are capital assets, the loss resulting therefrom shall, for the purposes of this chapter, be considered as a loss from the sale or exchange, on the last day of such taxable year, of capital assets.
>
> * * * * *

(26 U. S. C., 1952 ed., Sec. 23)

SEC. 117. [As amended by Section 150 (c) of the Revenue Act of 1942, c. 619, 56 Stat. 798].
CAPITAL GAINS AND LOSSES.

* * * * *

(b) *Percentage Taken Into Account.*—In the case of a taxpayer, other than a corporation, only the following percentages of the gain or loss recognized upon the sale or exchange of a capital asset shall be taken into account in computing net capital gain, net capital loss, and net income:

100 per centum if the capital asset has been held for not more than 6 months;

66⅔ per centum if the capital asset has been held for more than 18 months but not for more than 24 months;

50 per centum if the capital asset has been held for more than 6 months.

* * * * *

(d) *Limitation on Capital Losses.*—

* * * * *

(2) *Other Taxpayers.*—In the case of a taxpayer, other than a corporation, losses from sales or exchanges of capital assets shall be allowed only to the extent of the gains from such sales or exchanges, plus the net income of the taxpayer of $1,000, whichever is smaller. For purposes of this paragraph, net income shall be computed without regard to gains or losses from sales or exchanges of capital assets.

(e) *Capital Loss Carry-Over.*—

(1) *Method of Computation.*—If for any taxable year beginning after December 31, 1941, the taxpayer has a net capital loss, the amount thereof shall be a short-term capital loss in each of the five succeeding taxable years to the extent

that such amount exceeds the total of any net capital gains of any taxable years intervening between the taxable year in which the net capital loss arose and such succeeding taxable year. For purposes of this paragraph a net capital gain shall be computed without regard to such net capital loss or to any net capital losses arising in any such intervening taxable years.

(2) *Rule for Application of Capital Loss Carry-Over From 1941.*—The amount of the net short-term capital loss of the last taxable year beginning in 1941 (computed without regard to amounts treated as short-term capital losses from the preceding taxable year), which is not in excess of the net income for such taxable year, shall, to the extent of the net short-term capital gain for the succeeding taxable year (computed without regard to this paragraph), be a short-term capital loss of such succeeding taxable year.

(f) *Retirement of Bonds, Etc.*—For the purposes of this chapter, amounts received by the holder upon the retirement of bonds, debentures, notes, or certificates or other evidences of indebtedness issued by any corporation (including those issued by a government or political subdivision thereof), with interest coupons or in registered form, shall be considered as amounts received in exchange therefor.

* * * * *

(26 U. S. C., 1952 ed., Sec. 117)

STATEMENT

The facts of this case may be summarized as follows:

This case originated in the District Court for the District of Columbia as a civil proceeding for a refund of taxes for the years 1946 through 1950. (R. 1–10.) Petitioner, in a prior suit in which there were two hearings before the Tax Court and two appeals to the Court of Appeals for the Fourth Circuit,[2] claimed a deduction, by way of a carry-over for the year 1946 on account of a loss on capital stock which was asserted to have become worthless in 1945. He also claimed that the gain received on account of certain interest assignments was a return of capital. In the prior suit, the Tax Court held that the deduction must be denied because the stock became worthless prior to December 31, 1941, and the year of worthlessness antedated the period from which the loss could be carried over as a deduction to the taxable year 1946. It also held that the gain received on account of the interest assignments constituted ordinary income. The Court of Appeals affirmed, 209 F. 2d 154 (C. A. 4), and its decision became final under 26 U. S. C. 1140 because no petition for certiorari was filed. (R. 23–25.)

In the present suit brought in the District of Columbia, the taxpayer seeks a refund of taxes for the years 1946 through 1950, based upon the theory that in each of those years he was entitled to a deduction resulting from a carry-over of the loss allegedly

[2] *Cooper* v. *Commissioner*, decided September 7, 1951 (1951 P-H T. C. Memorandum Decisions, par. 51,267), affirmed in part, reversed in part and remanded, 197 F. 2d 951 (C. A. 4th); *Cooper* v. *Commissioner*, decided June 13, 1953 (1953 P-H T. C. Memorandum Decisions, par. 53,252), affirmed, 209 F. 2d 154 (C. A. 4th).

sustained in 1945, when the same stock involved in the prior proceedings is claimed to have become worthless, and also upon the theory that the same interest assignments involved in the prior proceedings resulted in a return of capital rather than a realization of income in 1946. (R. 1–10, 28–31.)

The District Court granted the Government's motion for summary judgment on the ground that the present action was barred by *res judicata* and collateral estoppel. (R. 42–43.) On appeal, the Court of Appeals in a *per curiam* order dated October 25, 1956, affirmed. (R. 53–54.) Thereafter, on November 8, 1956, petitioner filed a petition for rehearing *en banc*. On the same day, he also filed a motion for Judges Bazelon, Fahy and Bastian (comprising the panel which heard the case) to disqualify themselves. On November 26, 1956, the petition for rehearing was denied, Judges Prettyman and Fahy not participating. On the same day, the motion for disqualification was also denied, Judge Fahy not participating. On November 20, 1956, a petition for a "mandatory injunction or restraining order" was filed in this Court; it was denied on January 14, 1957.

ARGUMENT

1. In the instant case, petitioner seeks a refund of taxes for the years 1946–1950. (R. 1–10, 28–31.) However, since the issues involved here have been litigated in prior tax proceedings instituted by petitioner, the courts below correctly applied the doctrines of *res judicata* and collateral estoppel.

It is clear that to the extent petitioner seeks a refund for the year 1946, the cause of action involves the same subject matter as that involved in the prior tax litigation, namely, the correct tax liability for the year 1946. It is also clear that the final judgment in the prior tax litigation is a complete bar to relitigation of the identical issue in the instant suit. In the prior tax proceedings involving the year 1946, petitioner claimed, as he also does in this suit, that the United States Saving Bank stock involved became worthless in 1945 with the result that he was entitled to a deduction, by way of a carry-over to the year 1946. On remand, the Tax Court determined that the bank stock became worthless prior to December 31, 1941, thus precluding any possible claim that Section 117 (e), *supra*, pp. 3–4, would be applicable for the year 1946 or any other year for which petitioner is claiming a carry-over deduction because of an alleged loss in 1945. In the prior tax proceedings, petitioner also claimed, as he does in this suit, that the gain resulting from the assignments of interest was a return of capital. The Tax Court determined that since the assignments had been acquired at a cost of $3,185.95, and petitioner realized $10,619.83, the difference of $7,433.88 represented taxable income and did not qualify for capital gain treatment. On remand, the Tax Court decided that Section 117 (f), *supra*, p. 4, pertaining to retirement of certificates of indebtedness, did not apply. *Cooper* v. *Commissioner*, decided September 7, 1951 (1951 P–H T. C. Memorandum Decisions, par. 51,267), affirmed in

part, reversed in part and remanded, 197 F. 2d 951 (C. A. 4th); *Cooper* v. *Commissioner,* decided June 13, 1953 (1953 P–H T. C. Memorandum Decisions, par. 53,252), affirmed, 209 F. 2d 154 (C. A. 4th). This became a final decision upon petitioner's failure to file a petition for a writ of certiorari. Consequently, in accordance with the doctrine of *res judicata,* petitioner cannot relitigate the same issue in the instant suit. *Commissioner* v. *Sunnen,* 333 U. S. 591; *Otis & Co.* v. *Securities and Exchange Commission,* 176 F. 2d 34 (C. A. D. C.), reversed on other grounds, 338 U. S. 843, rehearing denied, 338 U. S. 888.

It is likewise clear that petitioner is barred from claiming in this suit that the bank stock involved became worthless in 1945 and that he is entitled to a deduction, by way of a carry-over, for the years 1947–1950. The question of whether the stock became worthless in 1945, so as to entitle petitioner to a carry-over deduction in 1946, was actually litigated by petitioner in the prior tax proceeding. While the tax year involved in the prior litigation was 1946, the issue concerning the year of worthlessness is the common factor crucial to the correct tax liability of all the years involved in this suit, namely, 1947–1950. Therefore, in accordance with the doctrine of collateral estoppel, petitioner cannot relitigate the same issue in this suit. *Tait* v. *Western Md. Ry. Co.,* 289 U. S. 620, 623; *Partmar Corp.* v. *Paramount Corp.,* 347 U. S. 89, 90–91.

2. No question of fraud with respect to the judgment in *United States Sav. Bank* v. *Morgenthau,* 85 F. 2d 811 (C. A. D. C.), certiorari denied, 299 U. S.

605, rehearing denied, 301 U. S. 666, was properly before the courts below.[3] The judgment in the *Savings Bank* case does not form the basis of any bar or estoppel here but it is the prior tax litigation, and that alone, which prevents petitioner from relitigating the tax issue in this case. Moreover, it might be observed that, even if the question were properly in this tax suit, relief from that judgment could not be obtained collaterally as attempted here but would have to be obtained in accordance with the Federal Rules of Civil Procedure, Rule 60 (b). *Pennoyer* v. *Neff*, 95 U. S. 714; *Williams* v. *North Carolina*, 325 U. S. 226; *Restatement of Judgments*, Sections 5–7, 11 (1942).

3. The procedural questions urged by petitioner (Pet. 2–3) are wholly without merit. No abuse of discretion was shown, and the court below properly found no error affecting substantial rights. (Pet. 13.) *Papagianakis* v. *The Samos*, 186 F. 2d 257 (C. A. 4), certiorari denied, 341 U. S. 921; *Eisler* v. *United States*, 170 F. 2d 273 (C. A. D. C.); Federal Rules of Civil Procedure, Rule 77 (d). The theory underlying petitioner's assertion of a violation of the Fifth Amendment of the Constitution is obscure. (Pet. 3, 4, 9, 10.) Manifestly, no claim that the Fifth Amendment was violated can be sustained on the facts as shown. Petitioner does not contend that there is a conflict in decisions; indeed, no conflict is presented. No novel question is involved, nor does any other rea-

[3] It might be pointed out that in the prior tax litigation, petitioner also asserted that the *Savings Bank* decision was procured by fraud, so that he is here attempting to relitigate that issue.

son appear which would warrant further review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 698

WADE H. COOPER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A REHEARING FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

WADE H. COOPER, *pro se,*
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Statement

This is a petition for a rehearing for a Writ of Certiorari to the District Court of Appeals for dismissing the bill to have declared fraudulent the order of 1936 (D. C. Court of Appeals) declaring the Bank in question insolvent, causing a stock loss to Petitioner in excess of $350,000.00, which he seeks to carry over under the law of 1941, and a refund of around $14,000.00.

Petition For Rehearing

Petitioner, Wade H. Cooper, prays the Court for a rehearing and a reconsideration of this case for the reasons stated under the argument.

Argument

1. The fundamental or primary question in this case, or the question without which the original complaint would never have been filed, is stated in language as plain as English words can make it in paragraph 2, page 9, of the Joint Appendix, which distinctly prays:

> That this Court declare that the order of the D. C. Court of Appeals, in the case of Bank vs. Morgantheau, *et al.* (69 D. C. Appeals 234, and 85 F. 2nd 811) of July 20, 1936, holding said savings bank insolvent was obtained by misrepresentation and fraud and is not binding upon this Court in the instant case.

Petitioner does not know *why* this Court denied the prayer of Petitioner for a writ of Certiorari in this case, but assumes for the reason, as stated by the D. C. Court of Appeals in its decision of October 25, 1956, that the claims are barred by *res judicata* and *collateral estoppel.*

Now let us remember, if the Court please, that the Court of Appeals (CCA4) is without original jurisdiction and

therefore Petitioner was forced into the District Court to obtain relief from the fraudulent order of 1936. And please remember that Petitioner did not and is not seeking any relief from the Court of Appeals (CCA4) whatever, as that Court was and is without any original jurisdiction. He is seeking relief from a fraudulent order of the District Court of Appeals of 1936, upon which the Tax Court and Court of Appeals (CCA4) based their opinions. Here is what the Respondent in his brief (page 9) says on this subject of estoppel:

> "The judgment in the *Savings Bank* case does not form the basis of any bar or estoppel here, but it is the prior tax litigation, and that alone, which prevents Petitioner from relitigating the tax issue in this case."

The record speaks for itself and clearly shows that Petitioner stated in his complaint all the facts, without concealment of any, and the cause of this action,—that the order of the Court of Appeals (CCA4) was based upon a fraudulent order.

When in this Country did it become unlawful or against the Rules for a complainant to tell the Court why he brings a suit or the purpose of the suit? They all admit that the lower Courts had jurisdiction, jurisdiction for what purpose, to grant a prayer of the complainant or run off at a tangent and grant some other prayer. With perfect courtesy the claim by either of the lower Courts that this suit is barred is without any foundation whatever.

Instead of prohibiting disclosures of the reasons for suit Rule 60(b) urged by Respondent, specifically requires a statement of the cause, and states positively:

> "This Rule does not limit the power of a Court (1) to entertain an action to relieve a party from a judgment, order or proceeding, or (2) to set aside within

> one year as provided in Section 57 of the Judicial Code, U. S. C. Title 28, Sec. 118, a judgment obtained against a defendant not actually personally notified."

This Court certainly understands that this complaint is *not* brought under Rule 60(b) for any mistake of Petitioner, but under the Equitable or Common Law right for relief from a fraudulent order caused, not by the Court, but by the defendants in that case. This is nothing less than a Machavellian attempt, a bold attempt to beg the real question, to hedge and dodge as a means to an end, to which this Court should not yield. Petitioner agrees 100 per cent with both the lower Courts that the order of the Circuit Court (CCA4) is *res judicata*, but that certainly is no bar to this suit for fraud.

2. The Respondent, The Government, is given 60 days (Rule 12(a) page (15)) in which to plead or answer under the law, but did not answer within five months, lacking 5 days, and then without permission of the Court (see affidavit of Rufus E. Stetson, Assistant U. S. Attorney, (Joint Appendix page 26). Rule 55(e) prohibits a judgment against the Government "unless the claimant establishes his claim or right to relief by evidence satisfactory to the Court". Petitioner was arbitrarily denied that right by the lower Courts. Giving the Government 60 days in which to answer certainly means what it says, and surely does not prohibit the entry of a judgment except as above stated in Rule 55(e). There is no denial of the various sums paid by Petitioner but a denial of the time,—a few days. Petitioner only prays for what the law allows.

3. The Rule 56(c) requires notice to a party for a hearing, which was never given to Petitioner for the alleged hearing of the "amended Motion" in violation of the rules as well as the due process clause of the Fifth Amendment

of the Constitution. (See affidavit of Petitioner (J. A. page 47)). The Supreme Court has denounced such conduct as a "fraud" and a "mockery", a "solemn fraud" and as "mere mockeries". See Windsor vs. McVeigh, 93 U. S. 281, (1876).

4. Respondent in his brief (page 7) says Petitioner "also claimed, as he does in this suit, that the gain resulting from the assignments of interest was a return of Capital". Respondent fails to differentiate between "Capital Gains" and return of capital. The Tax Court held the gains represented ordinary income and not "gifts" and did not qualify for "Capital Gain". The "Return of Capital" was never before the Court and is tax free (See amended complaint bottom of page 29 J. A.) and see Regulation 111, Sec. 29, 21-1(a) "a mere return of capital" is entirely free from taxation, and Penroad Corporation vs. Commissioner, Tax Court Vol. 21, page 1098 (1954).

5. On page 9 of his brief, in a footnote, Respondent goes outside of the record to say * * * "Petitioner also asserted that the *Savings Bank* decision was procured by fraud, so that he is here attempting to relitigate that issue." Why was this omitted from the answers and the motions? Why this fashion? If the Court will permit an answer, it is this: During the argument Judge Parker inquired of Petitioner: "What are we going to do about that decision of 1936?" Petitioner replied: Disregard it entirely, as it was obtained by misrepresentation and fraud. And finally Judge Parker stated as the Court was without original jurisdiction there was nothing they could do about it,— the fraudulent order or the affidavits showing fraud. The question of fraud was never in issue and never litigated. But prior to this petitioner in his brief at page 17 had denied the right of Respondent to inject the years 1936

and 1937 into the record, as neither year had ever been put in the pleadings and were never at issue.

6. The case of Pennoyer vs. Neff, 95 U. S. 714 (1877) cited by Respondent, was a case wherein the Supreme Court differentiated between a suit or judgment *in personam* and *in rem* and a proceeding *ex parte* and a judgment *coram non judice*. This Petitioner agrees with every holding made in this case. It is a long opinion of 35 pages and the Court held:

1. The judgment, if void when rendered, will always remain void.
2. That a person is not bound by a judgment without notice.
3. To have declared void an order, requires a direct action either by appeal or separate action.
7. For a denial of a jury trial.

Conclusion

(a) Rule 61 says the Court shall disregard the Rules and all mistakes * * * "which does not affect the substantial rights of the parties", which certainly means the legal and Constitutional rights of the parties, and not the personal opinion of any Judge or Justice.

Petitioner has already stated in his former reply brief (page 4):

> Certainly it would be a waste of time and money to relitigate the same questions, which does not apply here at all, as the instant case is to declare fraudulent the Court order of 1936, for the reason stated in the affidavits and exhibits.

He here and now repeats and confirms that statement and repudiates any such claim, and relies solely and exclusively upon the prayer in the original bill,—that the order of 1936 referred to, be declared fraudulent.

(b) It is a remarkable situation, that in the District Court the first order relying upon *res judicata* was never entered as the docket shows, until following the "amended motion", denying any material facts; and then in the Court of Appeals Counsel repudiated the "amended motion" and relied solely upon *res judicata*. But the Court of Appeals found no trouble in sustaining the phantom claim of *res judicata* when the prayer as already shown is for relief from the fraudulent order of 1936.

(c) Tacitus tells us that when Tiberius Caesar was accused with Piso of being a party to the death of Germanicus, he appeared before the Senate and urged the Senators to exercise the most rigorous impartiality: "Let them Judge", he said "without regard either for the imperial family or the family of Piso." Petitioner does not desire one dollar of this money unless he is entitled to it, and he respectfully urges this Court to follow the noble example as urged by Tiberius Caesar, and judge this case by the rule of reason, the rule of law and justice. Forget, if you wish, the delay in filing an answer, but do not put the highest court in the land in the position of sustaining such a phantom farce as this record discloses. Manifestly some of our Courts are to blame, and not the Attorneys, for such methods, the only way out, and would not attempt it, except as a result of such toleration by some of our Courts. The Court should always explain why a petition for certiorari is denied, and any law to the contrary should be repealed.

(d) Our Courts are the corner stone of our Government. When the corner stone is swept away, all is swept away, everything becomes flotsam and jetsam. Paraphrasing the language of Sophocles in his ode in the "Fragments of Bacchylides"—

> Who strikes at justice a cruel blow
> Lays the judicial reputation very low.

You men are final or absolute Judges in our world, just as much as the Almighty is the absolute in the celestial world.

(e) Petitioner respectfully urges Mr. Justice Frankfurter, Mr. Justice Reed and Mr. Justice Black to refrain from participating in this case, as all three of them refused to grant certiorari, unless Petitioner is mistaken, in the case where Petitioner sued for conspiracy to wreck the Bank, thereby approving the lower court holding that all officers of the Government are immune, so long as they act within the scope of their authority, clearly meaning that a conspiracy to wreck and destroy was "in the scope of authority", a paradoxical situation. They also refused to grant Certiorari where the lower Court required the Bank to pay 6 per cent interest following the payment of 100 per cent principal, both holdings contrary to law.

For the foregoing reasons Petitioner prays that this petition for a Rehearing for a Writ of Certiorari be granted.

Respectfully submitted,

March 23, 1957.

WADE H. COOPER, *Pro se*,
University Club,
Washington, D. C.

(I hereby certify that this petition is filed in good faith and not for delay and this petition is restricted to the grounds above specified.)

WADE H. COOPER.